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No. 73-506

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

DIAMOND CAB COMPANY OF SAN DIEGO COUNTY, INC.,
Petitioner,
v.
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO,
Respondent,
and
JOHN F. DUFFY, SHERIFF OF COUNTY OF SAN DIEGO,
Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF OF PETITIONER

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October 19, 1973

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REBUTTAL TO ARGUMENT OF REAL PARTY IN INTEREST IN OPPOSITION

In rebuttal to the argument of John F. Duffy, Sheriff of County of San Diego, Real Party In Interest, set forth on pages 6 through

12 of his brief filed herein, petitioner Diamond Cab Company of San Diego County, Inc., submits the following rebuttal:

I

CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE UNCONSTITUTIONALITY OF THE ORDINANCE ON ITS FACE IS NOT CURED BY AN APPEAL HEARING BEFORE THE COUNTY BOARD OF SUPERVISORS AFTER THE FACT OF SUSPENSION OF THE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY OF DIAMOND CAB COMPANY OF SAN DIEGO COUNTY, INC.

In *Jennings* v. *Maloney* [1971] 404 U.S. 25, 30 L.Ed.2d 146, cited in brief in opposition, the Supreme Court did not find a similar issue ripe for decision since the *trial court,* apparently doubtful of the due process qualities of the administrative proceedings, had stayed the suspension order and conducted a full *judicial* evidentiary proceeding on the propriety of the suspension at which appellant was given an opportunity to present evidence and cross-examine witnesses.

The instant case is contrasted by the fact that petitioner herein was never permitted a full *judicial* evidentiary hearing on the propriety of the suspension but only an after-the-fact hearing by an administrative tribunal. There was never a hearing before a court of law in which petitioner was afforded an opportunity to present evidence and cross-examine witnesses. Furthermore, there was never a complete stay of the suspension order pending the completion of judicial review of the case. Petitioner had to obtain temporary stay orders from four separate courts.

The instant case is more on point with a case cited in *Jennings,* namely, *Bell* v. *Burson,* 402 U.S. 535, wherein the petitioner was also afforded an *administrative* hearing. The Bell case held:

> ". . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective."

In *Bell* v. *Burson* it is interesting to note that, unlike the ordinance in the instant case, Georgia's Motor Vehicle Safety Responsibility Act provided for an administrative hearing *prior* to suspension of a driver's license.

On page 7 of the brief in opposition, the real party in interest cites three additional cases to support his contention that the issue of the constitutionality of the ordinance provision was rendered moot by the hearing before the Board of Supervisors. The cases cited dealt with fact situations much different from that of the instant case.

In *Doremus* v. *Board of Education* [1952] 342 U.S. 429, 432-433, 96 L.Ed. 475, 479, the cause relating to rights of a child as related to a statute providing for reading of the bible at public school was rendered moot when the child graduated from the public schools before the appeal was taken to the Supreme Court.

In *Davies* v. *Ichord* [D.C. Cir. 1970] 442 F.2d 1207, 1211-1212, an action against the House Committee on Un-American Activities was rendered moot when the Committee was abolished.

In *Troy State University* v. *Dickey* [5th Cir. 1968] 402 F.2d 515, 516, the action challenging the state university's denial of readmittance to a student newspaper editor become moot because

of the student's affidavit that he did not plan to reenter the university.

II

CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE IT IS ABUNDANTLY CLEAR FROM THE RECORD THAT THE FEDERAL QUESTION OF SUCH UNCONSTITUTIONALITY WAS RAISED IN SUFFICIENT TIME TO SUPPORT JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES.

On March 12, 1973, petitioner filed with the Superior Court Of the State Of California, for the County Of San Diego, its initial complaint to set aside suspension of certificate of public convenience and necessity which stated therein, "Said notice and suspension violate basic due process rights guaranteed plaintiff by the 14th Amendment to the United States Constitution."

On April 6, 1973, petitioner filed with the Superior Court "Points and Authorities In Support Of Contention That San Diego County Ordinance No. 3905 Is Unconstitutional On Its Face" and the contents thereof *specifically* relate to the *particular* question presented by the petition before this Court.

CONCLUSION

The issue of the constitutionality of San Diego County Ordinance No. 3905 was raised at the outset of the case in the Superior Court and was the sole issue on subsequent petitions to the Court of Appeal and the Supreme Court of the State of California. Therefore, there is no question but that the constitutionality of the ordinance was properly raised and was the basis for the decisions of the California courts. For reasons cited, such issue of constitutionality was not rendered moot by a subsequent review of an administrative tribunal and, therefore, the petitioner respectfully urges that this Court grant the petition sought herein.

Respectfully submitted,

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Real Party In Interest.

Certificate of Service

I hereby certify that on this nineteenth day of October, 1973, three copies of the Reply Brief of Petitioner were mailed, postage prepaid, to each of the following named persons:

Presiding Judge of
the Superior Court
County Courthouse
220 West Broadway
San Diego, CA 92101

Robert C. Berry
County Counsel
(Attn:
W. J. Schwartz, Jr., Deputy)
1600 Pacific Highway
San Diego, CA 92101

I further certify that all parties required to be served have been served.

JOHN T. SCHALL
SCHALL & STENNETT

2800 El Cajon Boulevard
San Diego, CA 92104
Counsel for Petitioner